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Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term 1996

KAY BROWN, Petitioner

VS.

TOMMIE RAY SANFORD, INDIVIDUALLY
AND DBA TOMMIE RAY'S, Respondent

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

****

PETITION FOR A WRIT OF CERTIORARI

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27 pp

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER A DEBT WHICH AROSE FROM A JUDGMENT AWARDED UNDER A STATE'S DRAM SHOP ACT AGAINST THE SELLER, PROVIDER AND/OR SERVER OF ALCOHOLIC BEVERAGES SHOULD BE EXEMPT FROM DISCHARGEABILITY PURSUANT TO 11 U.S.C. § 523(a)(6).

LIST OF ALL PARTIES

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	RESPONDENT: Tommie Ray Sanford, Individually and dba Tommie Ray's
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IN THE
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OCTOBER TERM 1996

KAY BROWN, Petitioner

v.

TOMMIE RAY SANFORD, INDIVIDUALLY
AND DBA TOMMIE RAY'S, Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Kay Brown respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unreported. (App. 1-4). The opinion of the United States District Court (App. 5-10) and the judgment of the Bankruptcy Court (App. 11-12) are unreported. The bankruptcy findings were made on the record and are provided in the Appendix. (App. 13-20). The judgment from the 295th Judicial District

Court of Harris County, Texas is unreported and is set forth in the Appendix. (App. 21-24).

JURISDICTION

The Court of Appeals entered its judgment on July 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

1. 11 U.S.C. § 523 - Due to its length, the entire statute is reprinted in the Appendix pursuant to Supreme Court Rule 14. See App. 25-33.

2. Tex. Alco. Bev. Code §§ 2.01, 2.02 Due to its length, the entire statute is reprinted in the Appendix pursuant to Supreme Court Rule 14. See App. 34-35.

STATEMENT

I. STATEMENT OF FACTS

On October 2, 1990, Petitioner Kay Brown ("Petitioner") was seriously injured when her automobile was struck by an automobile being driven by Ed Reasoner ("Reasoner"). The accident occurred at approximately 9:45 p.m.

At the time of the accident, Reasoner was legally intoxicated. Prior to the accident, Reasoner had been drinking continuously at Respondent Tommie Ray's for a period of over 10 hours.

Respondent is Tommie Ray Sanford, individually, and Tommie Ray Sanford in his capacity as the bar Tommie Ray's ("collectively Respondent"). Respondent provided and sold alcoholic drinks to Reasoner[1] at a time when Respondent knew Reasoner was intoxicated and presented a danger to himself and others.

Respondent further testified that he did not carry any type of liability insurance and made no provision to have funds in case anyone was injured due to Respondent's negligence and/or violations of the Texas Dram Shop Act. Respondent also admitted that it was his responsibility as the owner of the bar and provider of the liquor to supervise his employees. Respondent Tommie Ray Sanford still owns the bar.

Petitioner sued Respondent and Reasoner in the 295th Judicial District Court of Harris County, Texas. On April 2, 1993, Petitioner was awarded a judgment against Respondent by the 295th Judicial District Court. The 295th Judicial District Court found that Respondent was liable for providing or selling alcoholic beverages to an obviously intoxicated person pursuant to Tex. Alco. Bev. Code Ann. § 2.01 *et.seq.* (Vernon 1992) (the "Texas Dram Shop Act"). The 295th Judicial District Court further found that Respondent's violation of the Texas Dram Shop Act was the proximate cause of Petitioner's injuries.

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[1]Respondent argued that his employees actually served the drinks, but for the purposes of liability under the Texas Dram Shop Act, Tex. Alco. Bev. Code § 2.01 *et. seq.* (Vernon 1992), Respondent is liable because he provided the alcoholic beverages for sale under his liquor license.

II. FEDERAL JURISDICTION

This case arose under Title 11 of the United States Code. The Bankruptcy Court's decision was appealed to the District Court pursuant to 28 U.S.C. §§ 157 and 158(a). The District Court affirmed the Bankruptcy Court and this decision was appealed to the Fifth Circuit Court of Appeals pursuant to 28 U.S.C. §§ 157 and 158(a).

III. PROCEEDINGS BELOW

On April 29, 1993, Respondent filed a voluntary petition for relief under Chapter 7 of Title 11 of the United States Code (the "Bankruptcy Code"). On July 20, 1993, Petitioner timely brought a cause of action seeking to hold Respondent's debt to Petitioner nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

After a trial on the merits, the Bankruptcy Court found that Reasoner went to Respondent Tommie Ray's intending to and succeeding to get drunk. The Bankruptcy Court also found that Respondent Tommie Ray's, served Reasoner alcoholic beverages and that Reasoner was drunk at the time the drinks were being served. However, the Bankruptcy Court found that Respondent Tommie Ray Sanford, in his individual capacity, did not serve the drinks to Reasoner, therefore the liability was only vicarious and the debt to Petitioner was dischargeable..

The Bankruptcy Court granted the Final Judgment in favor of Respondent which was entered of record on January 25, 1996. Petitioner perfected her appeal to the

United States District Court on June 22, 1994. The United States District Court affirmed the Final Judgment of the Bankruptcy Court, and Petitioner perfected her appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit issued its opinion affirming the holdings of the District Court and the Bankruptcy Court on July 5, 1996.

REASONS FOR GRANTING THE PETITION

This Petition for Writ of Certiorari should be granted because the decision of the Fifth Circuit Court of Appeals involves an important question of federal law that has not been and should be settled by this Court.

I. JUDGMENTS UNDER STATE DRAM SHOP ACTS SHOULD BE EXCEPTED FROM DISCHARGE

The question presented involves the nondischargeability of debts which arise from judgments pursuant to a Dram Shop Act. This issue has not been addressed, by any Bankruptcy Court, United States District Court or this Court that has been reported, and the Bankruptcy Code is silent on this issue.

The Bankruptcy Code specifically addresses the nondischargeability of debts which arise from injuries cause by drunk drivers, but the debts that arise from the actions of those who help the drunk become more intoxicated are not specifically dealt with. The debts that arise from violations of a state's Dram Shop Act should receive the same treatment as those debts that arise from the injuries caused by drunk drivers.

A. Claims Arising Under Violation of a State's Dram Shop Act Are Analogous to Claims that are Nondischargeable Under 11 U.S.C. § 523(a)(9)

Prior to the enactment of 11 U.S.C. § 523(a)(9), judgments or debts caused by injuries from intoxicated drivers were held nondischargeable under 11 U.S.C. § 523(a)(6). *See In re Adams*, 761 F.2d 1422 (9th Cir. 1985). At the time

that Congress enacted 11 U.S.C. § 523(a)(9), most of the existing dram shop statutes did not exist. For example, the Texas Dram Shop Act, the statute at issue in the case at bar, was not enacted until 1987, and has not, prior to the present case, been challenged in the Bankruptcy Court in any type of reported opinion.

The policy behind holding debts arising out of injuries by drunken drivers nondischargeable involves the voluntary nature of the act by the driver. See *Adams*, 761 F.2d 1422. Although this act may be considered one of negligence, the "voluntary acts of drinking and driving while intoxicated constitute conduct sufficiently intentional to support a finding of willfulness and malice as contemplated by 11 U.S.C. § 523(a)(6) . . .." *Adams*, 761 F.2d at 1427. *See also In re Greenwall*, 21 B.R. 419, 421 (S.D. Ohio 1982) (liabilities incurred as a result of drunk driving held nondischargeable because the "voluntary drinking by defendant constituted an intentional act sufficient to support the conclusion that the injury caused by the defendant was willful and malicious"); *In re Callaway*, 41 B.R. 311, 346 (Bankr. E.D. Penn. 1984) (voluntary act of drinking and driving in an intoxicated state is sufficiently intentional and deliberate to make debt nondischargeable); *In re Wooten*, 30 B.R. 357, 358 (Bankr. N.D. Ala. 1983) (debt is nondischargeable because act of drinking is intentional act).

The reasoning that was applied in *Adams* and its progeny should be applied in cases involving judgments arising from Dram Shop Act violations. The voluntary act of serving an already intoxicated person is sufficiently intentional and deliberate to make the debt nondischargeable.

Under a Dram Shop Act, a person who has provided, sold or served alcoholic beverages to an already intoxicated

person who presents a clear danger to himself or others can be liable for the injuries caused by the intoxicated person. *See e.g.*, Tex. Alco. Bev. Code § 2.02. The voluntary act of a debtor in providing, selling or serving alcoholic beverages to a person whom he knows is obviously intoxicated to the extent that person presents a clear danger to himself and others which results in injury should certainly fall within the willfulness and malice as contemplated by 11 U.S.C. § 523(a)(6).

Dram Shop statutes provide exclusive statutory remedies and usually preclude any remedy for a common law cause of action under negligence. *See* Tex. Alco. Bev. Code § 2.01 *et. seq.*; *Sewell v. Smith*, 819 S.W.2d 565 (Tex. Civ. App.—Dallas 1991) *aff'd* 858 S.W.2d 350 (Tex. 1993) (Although the Texas Supreme Court implied that the statute was one of negligence, Sewell only dealt with the comparative negligence of determining liability between the provider of the alcoholic beverages and the intoxicated person. Sewell did not deal with the liability between the provider of the alcoholic beverages and innocent third parties injured by the intoxicated person.) *See also Fuller v. Maxus Energy Corp.*, 841 S.W.2d 881 (Tex. Civ. App. — Waco 1992, no writ).

Holding that violations of state Dram Shop Acts would be consistent with the public policy behind the enactment of the Dram Shop Acts. The voluntary act of an entity or person who willfully provides for sale or sells beverages under his liquor license to a person whom he knows is already intoxicated should not be able to absolve his intentional act by filing bankruptcy. *See In re Cloutier*, 33 B.R. 18, 20 (Bankr. D. Me. 1982) (debt resulted from driving while intoxicated held nondischargeable because substantial certainty of injury resulted from judgment debtor's drinking gave rise to inference of intent to injure).

B. **Negligent Actions Can Give Rise to Willful and Malicious As Defined by 11 U.S.C. § 523(a)(6)**

Although, the argument may be made that a person's violation under a Dram Shop Act is merely one of negligence, this is not sufficient to take the debtor entirely out of the willful and malicious standard that is set forth in 11 U.S.C. § 523(a)(6). It is the nature of the action that will determine whether it meets the willful and malicious standard of 11 U.S.C. § 523(a)(6).

Willful means deliberate or intentional. Malicious means a conscious disregard of one's duties or without just cause or excuse and does not require ill will or specific intent to do harm. *Chrysler Credit Corp. v. Perry Chrysler Plymouth, Inc.*, 783 F. 2d 480 (5th Cir. 1986); *In re Quezada*, 718 F.2d 121 (5th Cir. 1983); *Perkins v. Scharffe*, 817 F. 2d 392 (6th Cir. 1987), *cert. denied*, 484 U.S. 853 (1987). The standard for determining whether a debt should be discharged is "[w]hen a wrongful act, . . . done intentionally, necessarily produces harm and is without just cause or excuse, it is 'willful and malicious' even absent proof of specific intent to injure." *In re Keller*, 106 B.R. 639, 643 (9th Cir. 1989) (citing *Impulsora Del Territorio Sur., S.A., v. Cecchini*, 780 F.2d. 1440, 1442-1443 (9th Cir. 1986). Courts have held negligent actions in malpractice cases to be nondischargeable if certain elements are present. *See Keller*, 106 B.R. 639.

The requisite elements that need to be found are: 1) that the debtor know, expected or should have known, form an objective perspective, that his conduct was certain or almost certain to cause harm; 2) the debtor's conscious disregard of his duties without just cause or excuse in a manner that he should have known presented a risk of harm; and 3) the debtor's willingness to risk a creditor's loss due to

the prospect of personal benefit. *Keller*, 106 B.R. at 644. *See also In re Strauss*, 99 B.R. 396, 399-400 (Bankr. N.D. Ill. 1989) (debtor's knowledge that an act could cause foreseeable injury, but refuses to take steps to prevent same is malicious. Failure to procure worker's compensation insurance is malicious injury). These elements give rise to subjective intent and implied malice. When intent and malice are present, even though the state court judgment is one of negligence, the debt should be nondischargeable. *See In re Dean*, 79 B.R. 659, 662 (Bankr. N.D. Tex. 1987); *See also Scharffe*, 817 F.2nd 392; *In re Franklin*, 726 F.2d 606 (10th Cir. 1984).

Like the malpractice cases and the cases involving injuries caused by drunk drivers, debts arising out violations of state Dram Shop Acts should be nondischargeable. The voluntary act of the debtor providing or selling alcoholic beverages to a person whom he knows is obviously intoxicated which results in an injury should certainly fall within the willfulness and malice as contemplated by 11 U.S.C. § 523(a)(6). The voluntary act of an entity or person who willfully provides for the sale or sells alcoholic beverages under his liquor license should not be absolved from all liability simply because he personally did not serve the drink to the already intoxicated person.

Just as the intoxicated person cannot relieve its liability for injuries he causes by filing Chapter 7, neither should the person who provided the liquor to the intoxicated person be able to absolve his liability. The Bankruptcy Code specifically exempts debts caused by injuries from intoxicated drivers. *See* 11 U.S.C. § 523(a)(9). The Bankruptcy Code should also exempt from discharge the debts of those individuals who provided additional alcoholic beverages to the already intoxicated person.

C. Dram Shop Acts Place Primary Liability On the Provider of the Alcoholic Beverages

Dram Shop Acts, such as the Texas Dram Shop Act are not statutes of vicarious or imputed liability, as both the Fifth Circuit and the Bankruptcy Court interpreted, but rather are direct liability statutes. The statutes place direct liability on the person who provides, sells or serves the liquor. *See e.g.*, Tex. Alco. Bev. Code § 2.02. Therefore, even if the debtor did not actually serve the drink but provided such beverages for sale under his liquor license, he is directly responsible for the injuries caused. *See* Tex. Alco. Bev. Code § 2.02.

A provider of alcoholic beverages is defined as a person who sells or serves an alcoholic beverage under authority of a license or permit or someone who otherwise sells an alcoholic beverage to an individual. *See e.g.* Tex. Alco Bev. Code § 2.01.

Therefore, a person who violates a state Dram Shop Act, voluntarily and intentionally provides for the sale of alcoholic beverages to an already intoxicated person which causes injuries to an innocent third party. This person should not be able to walk away from his liabilities simply by filing a proceeding in bankruptcy and claiming that he did not actually serve the drinks to the intoxicated person. To reach this conclusion flies in the face of the public policy behind the Dram Shop statutes.

II. The Decision of the Court of Appeals is Erroneous

The Fifth Circuit affirmance of the Bankruptcy Court's finding that Sanford's debt should be dischargeable cause he 1) "did not personally sell any drinks to Reasoner," and 2) that "Sanford's actions, because he had no personal involvement, were not willful, but rather, at worst negligent" (App. at 3-4) is erroneous for several reasons.

First, the Bankruptcy Court misinterpreted the liability under the Texas Dram Shop Act. The Texas Dram Shop Act put direct liability upon Respondent in his capacity as Tommie Ray's for providing and selling the liquor, even if he did not serve the liquor. Thus, contrary to the Bankruptcy Court's interpretation, this was not a case of vicarious liability. *See Section IC supra.*

Second, negligence in certain circumstances such as in drunk driving cases and malpractice actions can be willful and malicious for the purposes of 11 U.S.C. § 523(a)(6). When the requisite elements that give rise to a subjective intent and implied malice, it is sufficient to bar the dischargeability of the debt under 11 U.S.C. § 523(a)(6). *See Section IB supra.*

The 295th Judicial District Court of Harris Count found that Tommie Ray Sanford dba Tommie Ray's was liable to Appellant because he provided or sold the alcoholic beverages to an already intoxicated person. (App. at 21-22) Based upon the fact that Respondent held the liquor license for Tommie Ray's, the 295th Judicial District Court awarded judgment for Petitioner against Respondent, individually and doing business as Tommie Ray's. (App. 21-24)

In the present case, Respondent filed a Chapter 7 bankruptcy individually and for his dba, Tommie Ray's. Respondent testified that he never supervised any of his employees even though he knew it was is responsibility not to serve or sell alcoholic beverages to already intoxicated persons, and that he did not carry any liability insurance to cover any risk. Further, the 295th Judicial District Court found him primarily liable for selling alcohol beverages to Reasoner, which was the proximate cause of Petitioner's injuries. These findings alone give rise to the intent and malice that would make this case nondischargeable under the standards in similar cases. *See In re Pineau*, 149 B.R. 522, 527 (Bankr. D. Me. 1992), rev'd on other grounds, 149 B.R. 239 (D. Me. 1993); *Strauss*, 99 B.R. at 399-400; *Dean*, 79 B.R. at 662.

The Fifth Circuit found no error in the Bankruptcy Court's finding that Sanford did not personally sell any drinks to Reasoner; therefore his actions were only vicarious and not willful and malicious under 11 U.S.C. § 523(a)(6). This analysis ignores the plain intent of the Texas Dram Shop Act which placed direct liability on Sanford as the owner of Tommie Rays for providing the liquor for sale to Reasoner. *See* Tex. Alco. Bev. Code § 2.02.

There is no case law on point which has interpreted a Dram Shop statute as to whether the liability is imputed and whether a violation under the statute is willful and malicious as defined by 11 U.S.C. § 523(a)(6). The cases that were relied on by the Bankruptcy Court and the District Court to show that imputed or vicarious liability cannot necessarily give rise to the malicious and willful standard required to hold a debt nondischargeable are all distinguishable from the facts in the present case. These cases are all distinguishable because in all of the cases, either no judgment had been rendered in the state court against

the debtor, or the judgment which was rendered in the state litigation against the debtor was based solely on a statute that imputed only financial responsibility and not direct liability against the debtor. *See e.g. In re Austin*, 36 B.R. 306 (Bankr. N.D. Tenn. 1984) (No state judgment existed. Bankruptcy court found no evidence that minors were being served and state statute being sued under only placed financial responsibility on bar for serving the alcohol); *In re Rex*, 150 B.R. 505 (Bankr. D. Mass. 1993) (State Court judgment was rendered solely upon a theory of vicarious liability flowing from the actions of debtor's sons and no attempt to show that debtors had direct liability); *In re Horne*, 46 B.R. 814 (Bankr. N.D. Ga 1985) (underlying basis was financial responsibility for parent when son was driving while intoxicated and no independent liability found); *In re Eggers*, 51 B.R. 452 (Bankr. E.D. Tenn. 1985) (liability imputed to defendant's mother because of financial responsibility, but no independent cause of action against mother debtor).

The United States District Court relied heavily on *In re Taneff*, 901 B.R. 501, 503 (W.D.N.Y. 1996). However, in *Taneff*, the debtor did not specifically remember selling alcoholic beverages to the injured party. Additional, in *Taneff*, there was no existing Dram Shop statute or a state court finding that found the debtor in *Taneff* directly liable as in the case at bar. Unlike the statutes in the cases cited above, the Texas Dram Shop Act provided direct liability on Respondent for his act of providing and selling alcoholic beverages to Reasoner. *See* Tex. Alco. Bev. Code § 2.02. Under the Texas Dram Shop Act, Respondent had the responsibility to ensure that Respondent Tommie Ray's, his dba, did not provide for sale or sell liquor to an already intoxicated person. As the holder of the license or permit, Respondent had the responsibility and ability to ensure that when he provided the alcoholic beverages for sale, they did not get sold to an

already intoxicated persons. Despite Respondent's direct responsibility, he chose not to exercise this responsibility by failing to secure liability insurance and failing to properly supervise his employees and see that they did not sell or serve liquor to already intoxicated person. *See Pineau*, 141 B.R. at 527.

Also, unlike the facts in *Austin*, *Rex*, *Horne*, or *Eggers*, where the liability of the Debtors was caused solely by the act of another, Respondent's act of providing the alcoholic beverages for sale in the present case was the proximate cause of Petitioner's injuries. *See* App. 21-22. Although Debtor did not specifically serve the drinks, he was directly liable for providing for the sale the liquor that was served. It is this act which the Bankruptcy Court should have evaluated and not the liability of the Respondent.

Further, unlike *Taneff*, a judgment in this case had already been entered against Respondent. The Bankruptcy Court went beyond this State Court Judgement to determine the basis of liability. The Fifth Circuit's affirmance of this finding is directly contrary to its findings in *Garner v. Lehrer*, 56 F.3d 677, 677 (5th Cir. 1995). *See also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 9 S. Ct. 645 (1978). The Fifth Circuit should not have affirmed the Bankruptcy Court's finding of liability other than to determine whether the actual act of providing the alcoholic beverages for sale constituted a willful and malicious injury to Petitioner. *See Parklane Hosiery Co.*, 439 U.S. at 326, 9 S. Ct. at 648; *Garner*, 56 F.3rd 677.

The Fifth Circuit also erred by allowing the Bankruptcy Court to go behind the State Court judgment to render its finding that Respondent did not individually serve the drinks to Reasoner. Liability had already be established in the state

lawsuit and was barred from relitigation by collateral estoppel. *See Parklane Hosiery Co.*, 439 U.S. at 326, 9 S.Ct. at 648; *Garner*, 56 F. 3rd 677.

Lastly, the Fifth Circuit erred in affirming the Bankruptcy Court's findings because the Respondent in this case is not only Tommie Ray Sanford individually, but Tommie Ray's the dba which provided for and sold the alcoholic beverages to Reasoner when he was already intoxicated. Tommie Ray's was merely a dba and there is no corporate shield for Respondent Tommie Ray Sanford to hide behind. By finding only vicarious liability, the Bankruptcy Court and the District Court absolved Respondent of all of his liability for providing for the sale of alcoholic beverages to an already intoxicated person in direct contravention of the Texas Dram Shop Act. *See* Tex. Alco Bev. Code § 2.02.

Additionally, Respondent was even more culpable for his acts of providing and selling alcoholic beverages because Respondent did not carry liability insurance for his dba. Respondent knew he had direct liability for selling and providing alcoholic beverages to the general public, but intentionally did not carry any type of insurance or provide any funds to cover any risk. Now he is able to discard all risk by filing for Chapter 7 bankruptcy.

III. This Case Is Important

Public policy dictates that owners of establishments that serve alcoholic beverages should be aware of the dangers imposed by providing such beverages to an already intoxicated person. The enactment of the Dram Shop statutes placed the responsibility on business owners to help insure the safety of the streets from intoxicated drivers. When a bar owner, such as Respondent in this case, intentionally sells alcoholic beverages to a person that he knows is already intoxicated he should not be able to discharge this responsibility merely by filing a Chapter 7 proceeding. In the present case, the Respondent is even more culpable because of his failure to carry liability insurance and to supervise his employees from serving the alcoholic beverages he provided. Public policy dictates that these types of debts should be nondischargeable.

A person who willfully provides alcohol to an already intoxicated person is no different that the drunk person who voluntarily drives the car. The risk to third parties is the same. When a wrongful act is done intentionally without just cause or excuse, and such act produces harm, then the act is willful and malicious. *Keller*, 106 B.R. at 643.

In the present case, the requisite intent and implied malice are present. Respondent provided alcohol to Reasoner when Reasoner was obviously intoxicated to the extent that Reasoner presented a clear danger to himself and others, and the intoxication of Reasoner was the proximate cause of Petitioner's injuries. Therefore, the debt of Respondent to Petitioner's should be held to be nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

Accordingly, the Court is respectfully requested to grant the petition and reverse the judgment of the Court of Appeals.

CONCLUSION

At first blush, this case would appear to rest on a very special set of facts. However, unless this Court decides the dischargeability of debts which arise out of the Dram Shop statutes, restaurants and bars may begin to drop their liability insurance because they know that debts will be able to be discharged in bankruptcy. This would fly in the face of the public policy behind the enactment of the Dram Shop statutes, the "fresh start" policy behind the Bankruptcy Code, and the public awareness to stop accidents resulting from drunk drivers. Only this Court can reverse the erroneous interpretation of the Fifth Circuit and the Bankruptcy Court of the dischargeability of the debt that arose from the Texas Dram Shop Act.

Therefore, Petitioner respectfully requests the Court to grant her petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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U.S. COURT OF APPEALS
FILED
JUL. 05, 1996
CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20223
Summary Calendar

In The Matter of: TOMMIE RAY SANFORD

Debtor.

KAY BROWN,

Appellant,

versus

TOMMIE RAY SANFORD, doing business as Tommy Ray's,

Appellee.

Appeal from the
United States District Court
for the Southern District of Texas
(CA-H-94-2452)

Before DAVIS, BARKSDALE and DeMOSS, Circuit Judges.

PER CURIAM:*

At issue in this appeal from a district court order affirming the bankruptcy court is whether the debtor's liability for a judgment imposed by a state trial court, in which he (Tommie Ray Sanford) was found liable pursuant to the Texas Dram Shop Act for injuries caused by an intoxicated patron of his bar, was dischargeable. The bankruptcy and district courts both held that debt to be dischargeable and not encompassed by 11 U.S.C. § 523(a)(6), which excepts from discharge those debts for willful and malicious injury by the debtor to another entity. We **AFFIRM.**

I.

On October 2, 1990, Kay Brown was seriously injured when her automobile was struck by another automobile. The other driver, Ed Reasoner, was intoxicated at the time of the accident; he had left "Tommy Ray's", a bar owned by Sanford, immediately prior to the accident, and had been drinking continuously at the bar for several hours.

Brown sued Sanford in state court; he failed to appear; and Brown was awarded judgment for $1.9 million against Sanford d/b/a Tommy Ray's. The judgment provided that Sanford was liable for selling alcoholic beverages to an obviously intoxicated person, in violation of Tex. Alco. Bev. Code Ann. P.O. Box 202 (The Texas Dram Shop Act); and that Reasoner's intoxication was the proximate cause of Brown's injuries.

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Sanford filed under Chapter 7 of the Bankruptcy Code in April 1993, and Brown filed her Complaint to Determine Nondischargeability that July, claiming that Sanford's conduct was "willful and malicious" and thus nondischargeable under 11 U.S.C. § 523(a)(6). The bankruptcy court found that Sanford did not personally serve drinks to Reasoner and held that, although liable to Brown under state law, the acts giving rise to that liability were at worst negligent, and accordingly were not encompassed by the willful and malicious standard required for nondischargeability. The district court affirmed.

II.

We review the district court's review of the bankruptcy court *de novo*, applying the same standard applied there. The bankruptcy court's findings of fact are reviewed only for clear error, *e.g.*, ***In re Missionary Baptist Foundation of America, Inc.***, 712 F.2d 206, 209 (5th Cir. 1983); questions of law and mixed questions of law and fact, *de novo*. *E.g.*, ***Frame v. S-H, Inc.***, 967 F.2d 194, 202 (5th Cir. 1990).

Brown urges that the bankruptcy court erred when it found that the debt owed by Sanford as a result of his liability under the Texas Dram Shop Act was dischargeable. For the reasons given by the district court in its thorough opinion, we find no error. We conclude that the court's factual finding that Sanford did not personally sell any drinks to Reasoner is not clearly erroneous, and agree with its holding that Sanford's actions, because he had no personal involvement, were not willful, but rather, at worst, negligent. Moreover, we agree with both lower courts that, regardless of Sanford's

liability under Texas state law for the injuries Brown received, for purposes of the Bankruptcy Code, Sanford's actions were not a "willful and malicious injury by the debtor". 11 U.S.C. § 523(a)(6).

III.

For the foregoing reasons, the judgment is

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
JAN. 25, 1996
MICHAEL N. MILBY, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
TOMMIE RAY SANFORD	§	BANKRUPTCY NO.
Debtor.	§	93-2973-H4-7
	§	
KAY BROWN,	§	
	§	
Appellant,	§	CIVIL ACTION NO.
	§	H-94-2452
vs.	§	
	§	ADV. PROCEEDING
TOMMIE RAY SANFORD,	§	NO. 93-4430
Individually and d/b/a	§	
TOMMIE RAY'S,	§	
	§	
Appellee.	§	

MEMORANDUM OPINION AND ORDER

The above referenced civil cause is an appeal from a final judgment of the bankruptcy court whereby the debtor's liabilities were discharged in favor of the appellee Tommie Ray Sanford ("Sanford"). After reviewing the records in this proceeding and considering the applicable law, the court is of the opinion that the bankruptcy court's judgment should be **AFFIRMED**.

1. Factual Background

The facts are not in dispute. On October 2, 1990, appellant Kay Brown ("Brown") was injured in an automobile accident. The driver of the car which struck Brown, Mr. Ed Reasoner, had earlier become intoxicated at Tommie Ray's, a bar owned by Sanford. During the time Mr. Reasoner was at Tommie Ray's drinking, Sanford was not present.

Brown filed an action against Sanford in state court alleging negligence based on Sanford's violation of Tex. Alco. Bev. Code Ann. § 2.02 (Vernon 1992), i.e., the Texas Dram Shop Act. In the state court trial, Brown non-suited all the defendants except Sanford. Sanford failed to appear at the state court trial and judgment was entered against him in the amount of $1,900,000. Sanford's liability was based upon the Dram Shop Act which provides that a seller or provider of alcoholic beverages is liable where he sells or provides alcohol to an already apparently intoxicated patron, and the patron causes damage proximately caused by the patron's intoxication.

On April 29, 1993, Sanford filed for protection under Chapter 7 of the Bankruptcy Code. Brown subsequently filed a petition claiming that Sanford's violation of the Dram Shop Act was not dischargeable in that it was "willful and malicious" under 11 U.S.C. § 523(a)(6). After a trial on the merits, United States Bankruptcy Judge William Greendyke determined that Sanford's acts that gave rise to his liability in the state court action were at best negligence, and accordingly did not fit within the "willful and malicious" standard required for nondischargeability. It is from this determination that Brown appeals.

Brown presents the following points of error:

(1) the bankruptcy court erred in granting judgment for Sanford by holding that Sanford's debt was dischargeable pursuant to 11 U.S.C. § 523(a)(6);

(2) the bankruptcy court erred in holding that Sanford's conduct in providing alcoholic beverages to Mr. Reasoner was not malicious and willful;

(3) the bankruptcy court erred in holding that Sanford's serving of alcoholic beverages to Mr. Reasoner did not except Sanford's debt from being discharged pursuant to 11 U.S.C. § 523(a)(6); and

(4) the bankruptcy court erred in holding that Sanford's conduct in violation the Dram Shop Act did not except Sanford's debt to Brown from discharge.

II. Analysis

A. Standard of Review

The appropriate standard of review for a bankruptcy appeal is abundantly clear based upon the bankruptcy rules and the relevant case law. The bankruptcy court's finding of facts must be clearly erroneous in order to justify reversal, unless such findings are premised on improper legal standards. Bankr. R. 8013; In re Missionary Baptist Found. of Am., Inc., 712 F.2d 206, 209 (5th Cir. 1983). A finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed. In re Missionary, 712 F.2d at 209 (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

B. Issue for Determination

Although appellant asserts four points of error, each point turns on the question of whether the bankruptcy court erred in determining that Sanford's violation of the Dram Shop Act was not willful and malicious and, therefore, dischargeable under section § 523(a)(6). The Fifth Circuit has defined "willful and malicious" under section § 523(a)(6) to mean "without just cause or excuse." Matter of Garner, 56 F.3d 677, 681 (5th Cir. 1995). "Willful means intentional and malicious adds the absence of just cause or excuse." Id.

In interpreting the Texas Dram Shop Act, the Texas Supreme Court has determined that the Dram Shop Act provides a cause of action for negligence. Smith v. Sewell, 858 S.W.2d 350, 355-56 (Tex. 1993). In discussing whether Sanford's violation of the Dram Shop Act was dischargeable under section § 523(a)(6), Judge Greendyke stated that:

> ...we end up with a valid state court judgment. We end up with a finding that we have no personal involvement by Mr. Sanford. Even if it was, it's negligence at best, and that doesn't suffice. We end up with — although we have liability under state law, that liability, because it's not directly derived from personal, active, affirmative behavior by Mr. Sanford, won't suffice for § 523(a)(6) purposes...

Transcript of Trial before Judge Greendyke (Instrument #32 in Adv. Proceeding No. 93-4438) at 52. In spite of Judge Greendyke's findings, Brown contends that Sanford's actions in not supervising his employees, not carrying liability insurance, and for intentionally serving alcoholic beverages to an obviously intoxicated person, who was in a position to

endanger himself or others shows Sanford's subjective intent and implied malice to injure Brown. Instrument #4 at 15-16.

Exceptions to the dischargeability of debts under the Bankruptcy Code are narrowly construed and the burden of proving nondischargeability of a debt rests on the creditor seeking to prevent discharge. In re Foreman, 906 F.2d 123 (5th Cir. 1990). It is well settled that negligence, or even recklessness or gross negligence, does not establish a willful injury for nondischargeability under section § 523(a)(6). In re Ikner, 883 F.2d 986, 990 (11th Cir. 1989); In re Chavez, 140 B.R. 413, 421 (Bankr. W.D. Tex. 1992). A willful injury under section § 523(a)(6) requires an action that the debtor intended for the purpose of causing injury or that the debtor knew was substantially certain to result in injury. In re Taneff, 1996 WL 8289, *7 (W.D.N.Y. Jan. 3, 1996) (citing In re Walker, 48 F.3d 1161, 1165 (11th Cir. 1995). "The Bankruptcy Code requires at least a deliberate action that is substantially certain to produce harm." In re Taneff, 1996 WL at *7 (quoting In re Conte, 33 F.3d 303, 309 (3d Cir. 1994).

After reviewing the record developed before the bankruptcy court, it does not appear that Judge Greendyke's findings were clearly erroneous. The Court finds that the bankruptcy court did not err in determining that Sanford's acts were not willful and malicious. Therefore, the bankruptcy court's judgment should be affirmed.

III. Conclusion

In accordance with the foregoing, the Court hereby

ORDERS that Brown's points of error are **OVERRULED; and**

ORDERS that the ruling of the bankruptcy court is **AFFIRMED**, and further

ORDERS that this case is **DISMISSED.**

THIS IS FINAL JUDGMENT.

SIGNED at Houston, Texas, this 24th day of January, 1996.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

IN THEUNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
JUNE 15, 1994
MICHAEL N. MILBY, CLERK

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE	CASE NO. 93-42973-H4-7
TOMMIE RAY SANFORD	CHAPTER 7
DEBTOR	
KAY BROWN Plaintiff	ADVERSARY NO. 93-4438
VS.	
TOMMIE RAY SANFORD Defendant	

JUDGMENT

CAME ON FOR trial, the COMPLAINT OBJECTING TO DISCHARGEABILITY OF DEBT, filed by KAY BROWN pursuant to 11 U.S.C. § 523(a)(6) against the Defendant, TOMMIE RAY SANFORD. Plaintiff and Defendant appeared in person and by counsel. The Court has jurisdiction of this matter and all parties entitled to notice have been properly notified pursuant to the requirements of the U.S. Bankruptcy Code, Federal Bankruptcy Rules, and the local rules of the Bankruptcy Court for the Southern District of Texas. The Court, having reviewed the record of this proceeding and considering the evidence and argument of counsel, read findings and conclusions into the record in open court, therefore (/s/ WG), it is

ORDERED, ADJUDGED, and DECREED that the debt of TOMMIE RAY SANFORD to KAY BROWN is hereby determined to be dischargeable. An Order of Discharge shall be entered in due course in case #93-42973-H4-7, styled, In re Tommie Ray Sanford. It is further

ORDERED, ADJUDGED, and DECREED that judgment is hereby entered against the Plaintiff and for the Defendant, denying all other relief sought in the Complaint.

SIGNED this date: 6/12/94

/s/ William Greendyke
U.S. BANKRUPTCY JUDGE

APPROVED AS TO FORM:

/s/ Don J. Knabeschuh
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KAY BROWN	§	CASE NO. 93-4438-H4-
	§	ADV
VERSUS	§	
	§	HOUSTON, TEXAS
TOMMIE LEE	§	April 29, 1994
SANFORD	§	10:26 TO 11:44 O'CLOCK
DEBTOR	§	A.M.

TRIAL

BEFORE THE HON. WILLIAM GREENDYKE, UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Plaintiff: Law Office of Mynde Eisen
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For the Defendant: Parker & Knabeschuh
DON J. KNABESCHUH
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Court Recorder: Brent Laswell

PREPARED BY:
JUDICIAL TRANSCRIBERS OF TEXAS, INC.
7035 West Tidwell
Building J, Suite 109
Houston, Texas 77092
(713) 462-6463

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

THE COURT: I don't read that every day. I'm looking at 2.01. It defines, the term "provider" means a person who sells or serves an alcoholic beverage under authority of a license or permit issued under the terms of the Code or who otherwise sells an alcoholic beverage to an individual.

The cause of action is 2.02. States, this chapter does not affect the right of any person to bring a common law cause of action against any individual whose consumption of an alcoholic beverage allegedly resulted in causing the person bringing the suit to suffer personal injury or property damage.

It provides a cause of action for providing, selling, or serving an alcoholic beverage, stating that it may be made the basis of a statutory cause of action under this chapter and may be made the basis of an administrative revocation proceeding under the Code upon proof that (1) at the time the provision of the beverage occurred it was apparent to the provider that the intoxicated — that the individual — I'm sorry — being sold, served, or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others.

And secondly, that the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered.

That's the basis for the liability.

Even though there is a state court judgment, I think I'm required to look behind the facts, look behind the judgment to the facts of the case to determine whether or not there is liability, if you will, under § 523(a)(6) of the Bankruptcy Code.

There's several ways in which debts become non-dischargeable. Some of them operate by operation of law, like taxes, alimony, child support don't get discharged in bankruptcy. Other ones, like § 523(2)(4)(6), and this is (6), have to be made the subject of a lawsuit, like the one that Ms. Eisen has brought here in court. And I have to make findings that the Debtor should not be discharged not by operation of law but because of the way the facts were in connection with the lawsuit.

That's why we're having this, and because of that obligation, I don't get to just take at face value that state court lawsuit in this instance and say you won in state court so you win here, and it's non-dischargeable. I have to look at what happened, particularly if there's some kind of ambiguity about what happened.

From, I guess, a rhetorical standpoint, I don't think collateral estoppel will attach because I don't think personally that the matters in dispute down there were actually litigated. That's neither here nor there, because I'm looking behind it anyhow to take a good and see what happened.

I'm going to be real specific about facts of what happened, and I'm going to make rulings with regard to the law, Ms. Eisen, because I think this is a significant case. I don't think this has happened, and I don't generally invite people to appeal, but I'm telling you, you're sure not going to offend me if you appeal, because you need to pursue it or forever be quiet about what's going on.

The evidence indicates that Mr. Reasoner went to the bar on October 2nd of 1990. While his testimony itself might not altogether always be credible particularly because of his ostensibly admitted state, the testimony of Mr. Thomason, the HLP lineman was pretty clear. And it all fits together. I've got too many people telling me the same story.

And the story is that Reasoner went to the bar with the ambition to get drunk, and he accomplished that.

Now, whether or not Ms. Rose sold him a drink or not or ordered that he not be given drinks the finding I make is that he succeeded in his ambition. He either got served by a bartender or he got his friends to buy drinks for him, and he drank. But he left the bar, and he was drunk.

It's also clear that he caused grievous damage to Ms. Brown and her family, and that resulted in the state court judgment. It's also clear, and I find that Tommie Ray Sanford did not serve, personally, any drinks. He did not know personally Mr. Reasoner. That's the significant part. I think that's where the bankruptcy law comes in and says unless there is some personal intentional act on the part of the Debtor, then we don't have any nondischargeable debt.

My conclusion is that notwithstanding the state court statute providing for liability for the holder of the permit, that in the absence of some evidence that the holder of the permit was the one who actually did the wrong, that we have no nondischargeability.

I think the State Supreme Court, when they rendered their decision in the *Sewell* case, I think that's something I can rely upon. I recognize that dealt with the application of comparative negligence statutes against someone who'd been doing the drinking. And I don't think that should cause me to discount their rationale and their analysis of the dram shop liability statute.

That statute walks, talks, and quacks just like a negligence statute. It is a negligence cause of action. That's the second basis for saying that we don't have an intentional act. Even if we find Mr. Sanford or one of his employees was negligent, that's not going to suffice.

Number one, Mr. Sanford wasn't an actor. And at best he's negligent in perhaps not enforcing some policies that I believe he did enforce. And the second this is that I don't think that negligence of an employee perhaps not monitoring the situation or perhaps in serving someone who was intoxicated cannot be imputed to him to in some way bar the discharge of this particular obligation, this valid state law obligation.

So, we end up with a valid state court judgment. We end up with a finding that we have no personal involvement by Mr. Sanford. Even if there was, it's negligence at best, and that doesn't suffice. We end up with — although we have liability under state law, that liability, because it's not directly derived from personal, active, affirmative behavior by Mr. Sanford, won't suffice for § 523(a)(6) purposes on the basis of the cases that I cited to you that I don't recall off the top of my head.

We don't have, to my knowledge, a similar statute. I know that's not a conclusive statement, but I think that the fact patterns and the statutory patterns that those other courts address are similar enough to this and the reasoning behind those other bankruptcy court decisions are similar enough for me to say that this is the way it ought to happen because of that other authority.

If there are other findings or conclusions that you all want me to make, above and beyond what I've done for purposes of completeness of the record, so that a district judge can render, as opposed to remand, so that we don't have to retry it, I welcome those.

We don't have a whole lot to fight about, I don't think. I don't intend on changing any of the findings that I've made here. There may be come others that you might think are necessary. I think I've given you enough to pitch the deal, if

you want, to a district judge and have him or her make a call — an appellate call on the law. There's not a whole lot of facts in dispute. There's no doubt about what happened in my mind, and any retrial of the state court issue is really unnecessary, since we know the legal point — from a legal standpoint, Mr. Sanford wasn't there, and he didn't do it personally — serve anybody personally. I think that's really what it turns on.

Any questions?

MS. EISEN: No, Your Honor.

THE COURT: Mr. Knabeschuh, I want a form of judgment from you denying the relief requested, and I need any additional findings and conclusions presented to me at the time that order's given. Go ahead and have Ms. Eisen sign off on the order. It shouldn't be very complicated or sophisticated. Just so she knows when to ask for any additional findings or conclusions, and likewise with you.

MR. KNABESCHUH: Do you want the findings and conclusions -

THE COURT: No. I've done it. I've —

MR. KNABESCHUH: — incorporated into this?

THE COURT: No. No. I read it into the record. You don't need to recapitulate them. If you want more beyond what I've done, that's going to be the time to ask me to do it because that's — it's never going —

MR. KNABESCHUH: Just a judgment denying — or —

THE COURT: Yes.

MR. KNABESCHUH: — holding the debt dischargeable.

THE COURT: Yes. I have this motion and this order to seal. I will have the document sealed unless you all ask me to retrieve it, and it'll remain in the clerk's safe.

I'm going to give it to Ms. Bellville now so she can take it to be docketed, and then put it in the safe.

Anything else?

MR. KNABESCHUH: Nothing from me.

THE COURT: Thank you all for waiting this morning. I'm sorry to hold you up. We'll be in recess until 1:00 o'clock, I believe.

MS. EISEN: Oh. Your Honor, one point. Does the Court want the original videos or is a copy of the videotapes sufficient?

THE COURT: A copy's fine with me, but you all can agree to that —

MS. EISEN: Yes, sir.

THE COURT: — on how you want to handle it. I think it ought to stay here until you're done so the district court can look at it if it needs to.

(These proceedings adjourned at 11:44 a.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ J. Finigan
Signature of Transcriber

Signature of Proofreader

7/7/94

9469
JTT#

NO. 91-04576

KAY BROWN	§	IN THE DISTRICT
	§	COURT OF
VS.	§	HARRIS COUNTY,
	§	TEXAS
TOMMIE RAY SANFORD	§	295TH JUDICIAL
dba TOMMIE RAY'S	§	DISTRICT

FINAL JUDGMENT

Be it remembered that on the 1st day of April, 1993, came on for trial the above styled cause. Plaintiff, Kay Brown, appeared in person and through counsel and announced ready. Tommie Ray Sanford d/b/a Tommie Ray's, Defendant, failed to appear. Jury was waived. The Plaintiff, Kay Brown, voluntarily non-suited Defendant, Edward Reasoner. Plaintiff, Kay Brown, previously voluntarily non-suited Defendant, State Farm Insurance Co. Intervenor, Employers Health Insurance, Inc., non-suited its intervention. The Court proceeded to hear evidence, including evidence regarding the provision of alcohol by Defendant, Tommie Ray Sanford d/b/a Tommie Ray's to Edward Reasoner when Edward Reasoner was obviously intoxicated to the extent that Edward Reasoner presented a clear danger to himself and others and, including evidence that the intoxication of Edward Reasoner was a

proximate cause of the Plaintiff's damages, and evidence regarding the amount and type of Plaintiff's damages in the past and future and after receiving the evidence, all competent and sufficient, the Court rendered its verdict that Kay Brown have judgment against Tommie Ray Sanford d/b/a Tommie Ray's in the amount of ONE MILLION NINE HUNDRED THOUSAND AND NO 100 ($1,900,000.00) DOLLARS. It is therefore,

ORDERED, ADJUDGED AND DECREED, that Kay Brown should recover the sum of ONE MILLION NINE HUNDRED THOUSAND AND NO 100 ($1,900,000.00) DOLLARS against and from Tommie Ray Sanford d/b/a Tommie Ray's, Defendant, for which let execution issue. The Court further finds that in accordance with Art. 5069.1.05 and the laws of the State of Texas that Plaintiff Kay Brown is entitled and hereby ordered the recovery of prejudgment interest in the amount of FIVE HUNDRED ELEVEN THOUSAND ONE HUNDRED NINETY-ONE AND 20/100 ($511,191.20) DOLLARS for which let execution issue.

It is further ORDERED, ADJUDGED AND DECREED, that Plaintiff, Kay Brown, have and recover the total sum of

TWO MILLION FOUR HUNDRED ELEVEN THOUSAND ONE HUNDRED NINETY-ONE AND 20/100 ($2,411.191.20) DOLLARS, from Defendant, Tommie Ray Sanford d/b/a Tommie Ray's, for which let execution issue.

It is further ORDERED, ADJUDGED AND DECREED, that the post-petition judgment interest at the legal rate for judgment shall run on the entire judgment and for which let execution render hereon.

It is further ORDERED, ADJUDGED AND DECREED, that Plaintiff, Kay Brown, have and recover all cost of court from Defendant, Tommie Ray Sanford d/b/a Tommie Ray's, for which execution shall lie hereon.

It is further ORDERED, ADJUDGED AND DECREED, that Motion for Summary Judgment of Tommie Ray Sanford d/b/a Tommie Ray's is denied.

It is further ORDERED, ADJUDGED AND DECREED, that Kay Brown take nothing by way of her suit against Edward Reasoner.

It is further ORDERED, ADJUDGED AND DECREED, that Plaintiff, Kay Brown, take nothing by way of her suit against State Farm Insurance Co.

It is further ORDERED, ADJUDGED AND DECREED, that Employer Health Insurance, Inc. take nothing by way of its intervention.

It is further ORDERED, ADJUDGED AND DECREED, that any relief not herein expressly granted is denied.

It is further ORDERED, ADJUDGED AND DECREED, that Plaintiff have all writs and processes as may be necessary in the enforcement and collection of this judgment.

SIGNED THIS 2ND DAY OF APRIL, 1993.

/S/ Dan Downey
JUDGE PRESIDING

APPROVED AS TO FORM:

JAMISON & ASSOCIATES

BY: /S/ Bruce L. Jamison
Bruce L. Jamison
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(713) 222-2756
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SECTION § 523 (11 U.S.C. § 523)

§ 523. Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt

(1) for a tax or a customs duty -

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $1,000 for "luxury goods or services" incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title, are presumed to be nondischargeable: "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined

for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act;

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6)* of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud and defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that

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* [Ed. Note: The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 (effective on October 22, 1994), added paragraph (15) to section 523(a) and amended section 523(c)(1) to include cross references to that paragraph. In conjunction with these amendments, Congress should have amended section 523(a)(3)(A) and (B) to include cross references to paragraph (15); this omission appears inadvertent.]

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or

nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless

(A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act; or [*sic*]

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a

fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency; or [*sic*]

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);

(15)* not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless

(A) the debtor does not have the ability to pay such debt from income or

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* [Ed. Note: Section 304 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 (effective on October 22, 1994), amended section 523(a) by adding a new paragraph (15). Although Congress intended to add this new paragraph at the end of subsection (a), the language of section 304 of the 1994 Act states that it is to be added at the end of "section 523." The editors have placed paragraph (15) in its intended location in subsection (a), rather than at the end of section 523.]

property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor; [*or*] [*sic*]

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has condominium ownership or in a share of a cooperative housing corporation, but only if such fee or assessment is payable for a period during which

(A) the debtor physically occupied a dwelling unit in the condominium or cooperative project; or

(B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period,

but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection

(a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965, or under section 733(g) of the Public Health Service Act in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c) (1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15) as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall

grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

(e) Any institution-affiliated party of a [*sic*] insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

Bankruptcy Rule References: 2002, 4004 and 4007

CHAPTER 2. CIVIL LIABILITIES FOR SERVING BEVERAGES

Section

2.01. Definitions.
2.02. Causes of Action.

Cross References

Revocation or suspension of license or permit, see V.T.C.A., Alcoholic Beverage Code § 6.01.

§ 2.01. Definitions

In this chapter:

(1) "Provider" means a person who sells or serves an alcoholic beverage under authority of a license or permit issued under the terms of this code or who otherwise sells an alcoholic beverage to an individual.

(2) "Provision" includes, but is not limited to, the sale or service of an alcoholic beverage.

Added by Acts 1987, 7th Leg., ch. 303, § 3, eff. June 11, 1987.

§ 2.02. Causes of Action

(a) This chapter does not affect the right of any person to bring a common law cause of action against any individual whose consumption of an alcoholic beverage allegedly resulted in causing the person bringing the suit to suffer personal injury or property damage.

(b) Providing, selling, or serving an alcoholic beverage may be made the basis of a statutory cause of action under this chapter and may be made the basis of a revocation proceeding under Section 6.01(b) of this code upon proof that:

(1) at the time the provision occurred it was apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others; and

(2) the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered.

Added by Acts 1987, 7th Leg., ch. 303, § 3, eff. June 11, 1987.